to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war. . . ."

and at page 15:—

"By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."

In the light of the passages cited above, their Lordships are of the opinion that under international law it is clear that appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested. In their opinion Chua J. and the Federal Court were right in rejecting the appellants' plea on this ground.

Mr. Le Quesne further contended that the appellants' act in placing the explosives was a legitimate act of war and that they could not therefore be tried for murder. The Federal Court in rejecting the appellants' plea, appear to have done so partly on the ground that placing the explosives in MacDonald House "a non-military building in which civilians are doing work unconnected with any war effort" was not a legitimate act of war. "The immunity of non-combatants from direct attack is one of the fundamental rules of the international law of war" and "non-combatants are not, under existing international law a legitimate military objective" (Professor Lauterpacht in *Oppenheim, supra,* at pages 524 and 525).

As, if they were members of the Indonesian armed forces, in their Lordships' opinion, they forfeited their rights under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their Lordships' view no room for the application of article 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisdiction of Singapore cannot be invalidated.

For these reasons, their Lordships were of the opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Jaques & Co.; Charles Russel & Co.*

COMMISSIONER OF THE FEDERAL CAPITAL v. INSURANCE COMPANY OF NORTH AMERICA

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L. — Federal Court Civil Appeal No. X60 of 1967]

Arbitration — Condition that claim must be referred to arbitration within a time limit — Lapse of time — Inherent jurisdiction of court to restrain limitation being pleaded — Arbitration Ordinance, 1950, s. 5.

Insurance — Limitation period in contract of — Lapse of time — Inherent jurisdiction to restrain defendants' setting up limitation as defence in certain circumstances.

Limitation — Lapse of time — Court has power to prevent limitation being pleaded — Civil Law Ordinance, 1956, s. 3(1) and Courts of Judicature Act, 1964, ss. 23(2) & 25(2).

The respondent, insurer for the appellant, was brought in as a third party to an action instituted by the Central Electricity Board against the appellant, claiming compensation for damage caused to certain electrical installations. Clause 7 of the contract of insurance read:— "If the company shall disclaim liability . . . and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration . . . the claim shall for all purposes be deemed to be abandoned . . ."

The notice of disclaimer was served on the appellant on March 12, 1965. On August 4, 1965, the respondent applied for an order under section 5 of the Arbitration Ordinance, 1950, to stay further proceedings until the differences between the appellant and the respondent were submitted to arbitration. The order was granted on September 26, 1966, that is, after the expiry of the contractual period of limitation.

The appellant by way of motion, applied for a variation of the order to the effect that the respondent should be precluded from relying on the lapse of time between August 4, 1965 and September 26, 1966 in computing time for the purpose of pleading limitation under clause 7 of the contract as a defence to the claim in the arbitration proceedings. Gill J. dismissed the motion ([1967] 2 M.L.J. 161). On appeal,

Held, allowing the appeal: (1) by virtue of section 3(1) of the Civil Law Ordinance and section 23(2) and 25(2) of the Courts of Judicature Act, 1964, the High Court has inherent equitable jurisdiction to restrain a defendant from setting up the defence of limitation under a contract (or statute) if the following circumstances are present: (a) two forums with nominal jurisdiction to hear and resolve a dispute between the same parties; (b) the statutory or contractual period of limitation should have expired whilst the question of the appropriate forum to resolve the dispute was pending; (c) it was beyond the control of the aggrieved party to do anything consistent with his legal rights to escape the consequences of his claim being barred by the effluxion of time;

(2) the conditions necessary for the court to exercise its inherent jurisdiction were present in this case. An order should therefore be made varying the order of September 26, 1966 in terms of the motion.

Cases referred to:—

(1) *MacKenzie* v. *Marquis of Powis* (1737), 7 Brown. 282; 3 E.R. 183.

(2) *Sturt* v. *Mellish* (1743), 2 Atk. 611; 26 E.R. 765.
(3) *Sirdefield* v. *Price* (1827), 2 Y. & J. 73; 148 E.R. 837.
(4) *Peeres* v. *Bellany* noted at 2 Vern. 504; 23 E.R. 922.
(5) *Gilbert* v. *Emerton* (1705), 2 Vern. 504; 23 E.R. 922.
(6) *Liberian Shipping Corporation* v. *A. King & Sons Ltd.* [1967] 1 All E.R. 934.
(7) *Compagnie Du Senegal* v. *Woods* (1883), 49 L.T. 527.
(8) *Pini* v. *Roncoroni* [1892] 1 Ch. 633.
(9) *Scott* v. *Avery* (1856), 5 H.L.C. 811; 10 E.R. 1121.

FEDERAL COURT.

Yong Pung How for the appellant.

D. G. Ironside for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: This is an appeal against the judgment of Gill J., dismissing a motion by the appellant to vary the terms of an interlocutory order made pursuant to section 5 of the Arbitration Ordinance, 1950, in Kuala Lumpur, High Court Civil Suit No. 230 of 1965, staying all further proceedings until the differences between the appellant and the respondent in regard to the matter in dispute in the suit are determined by arbitration as agreed under a written agreement contained in a policy of insurance dated the 9th of March, 1962.

The suit was instituted by the Central Electricity Board of the Federation of Malaya against the appellant who is the Commissioner for the Federal Capital (1st defendant) and one Lim Wah Woon (2nd defendant), claiming compensation for damage caused to the plaintiff's electrical installations in the course of constructing certain public works by the 2nd defendant, under contract, for the appellant. Both defendants were insured against such contingency under the aforesaid policy of insurance issued by the respondent herein, the Insurance Company of North America, and the third party to the suit.

The variation prayed for is the addition of a proviso to the interlocutory order, to the effect, that the respondent shall not be entitled to rely and be precluded from relying on the lapse of time between the 4th of August 1965 — the date on which the respondent applied for stay — and the 26th of September, 1966 — the date on which the order for stay was made — in computing time for the purpose of pleading contractual limitation as a defence to the claim in the arbitration proceedings, by virtue of a condition in clause 7 of the contract which reads:—

"If the company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The notice of disclaimer was served on the appellant on 12th March, 1965. The third party notice was served on the respondent on the 2nd of July. The application for stay of proceedings was taken out on the 4th of August. The hearing was fixed for the 6th of September, 1965, but postponed to a date to be fixed by the court at the request of the appellant's counsel, who had intimated that his arguments against the stay would be somewhat lengthy. The contractual time before which the dispute had to be submitted to arbitration is said to have expired on 12th March 1966. The hearing of the motion for stay was eventually fixed by the court for the 26th of September, 1966, when, after a preliminary skirmish between counsel lasting five minutes, the order for stay was made.

Counsel for the appellant contends that the respondent should not be permitted to take advantage of the lapse of time since it was brought about mainly through circumstances beyond control, namely, the "lamentable delay" by the court in fixing the date of hearing of the application for stay, and partly, on the one hand, by the failure of the respondent to reasonably prosecute his application, and on the other, to the failure of the appellant to ensure that the application was brought on in due time. The degree of responsibility, according to counsel, was in the descending order as enumerated above.

In support of his application, he relies on cases in which the old High Court of Chancery in England had exercised its inherent jurisdiction to grant relief against 'hardship' caused by the lapse of time under the Statute of Limitation when a plaintiff was in the course of actively pursuing his right of action in the court itself. Those were cases in which the plaintiff had to decide whether to 'exhibit a bill' in the Court of Chancery or the Court of Common Pleas since mixed questions of law and equity were involved. Where he had chosen the Court of Chancery and the court had subsequently ruled that the appropriate forum was the Court of Common Pleas, it either retained the bill and directed an issue to be tried at law or dismissed the action, and left it to the plaintiff to institute fresh proceedings in the proper court. But in cases where, in the meantime, the claim had become barred by the Statute of Limitation, the court when directing, a bill to be retained and an issue tried at law as in *MacKenzie* v. *Marquis Powis* (1) or in dismissing the action with liberty to institute fresh proceedings as in *Sturt* v. *Mellish,* (2) ordered, in the first case, that the defendant "shall not be permitted to plead or insist on the Statute of Limitation", and, in the

second, that "time which has run during the pendency of this suit shall not be taken advantage of at law". In *Sirdefield* v. *Price,*(3) a bill was retained by a court of equity and leave was given to the plaintiff to bring an action at law in respect of a part of his claim on two promissory notes and an I.O.U. chit The plaintiff then brought the action in the Court of Common Pleas, whereupon the defendant pleaded the Statute of Limitation The time, in fact, had run out on the first instrument before the bill was exhibited in the Court of Equity and in respect of the other two, afterwards. The plaintiff, thereupon, applied to the Court of Equity to restrain the defendant from pleading limitation and in making an order restraining the defendant from pleading limitation, Alexander L.C.B. said:—

"It would be in the highest degree unjust and would be contrary to all the practice of this court, and to the merits of the case, if the defendant were to be allowed to avail himself of the statute as to the last two notes."

The order made in that suit contained the following directions, namely: "That the defendant be restrained from insisting at law upon the statute of limitation." But where a bill had been exhibited in respect of a cause of action over which the Court of Chancery had no jurisdiction to adjudicate as in *Peeres* v. *Bellamy* (4) cited in *Gilbert* v *Emerton,*(5) in dismissing the bill, the court "refused to direct that the Statute of Limitation should not be given in evidence" because the issue was a matter, exclusively, triable in law.

Counsel for respondent submitted that the decisions by the Court of Chancery in the cases above referred to were of no special significance, except, as matters of historical interest; and that since the passing of the Judicature Act of 1873 and the abolition of the High Court of Chancery, the High Court of Justice in England had not exercised that jurisdiction. However, once it is admitted that the Court of Chancery before the passing of the Judicature Act did exercise the jurisdiction, then it must also be admitted that all the powers so exercised vested in the High Court of Justice in England by virtue of section 16 of the Judicature Act of 1873. The relevant portion of the section reads:—

"The High Court of Justice shall be a superior court of record, and, subject as in the Act mentioned, there shall be transferred and vested in the said High Court of Justice the Jurisdiction which at the commencement of this Act, was vested in, or capable of being exercised by all or any of the courts following (that is to say),

(1) The High Court of Chancery etc. . ."

Section 16 was subsequently re-enacted as section 18 of the Supreme Court of Judicature (Consolidation) Act of 1925. But it is apparent that if the High Court did not exercise that power, it was because circumstances thereafter did not lend themselves to the exercise of that power. No more were litigants confronted with the problem of choosing the right court to bring an action. As for the High Court of Malaysia, the equitable jurisdiction of the High Court of England is vested therein by virtue of the provisions of section 3(1) of the Civil Law Ordinance and section 23(2) and section 25(2) of the Courts of Judicature Act, 1964.

Another point taken was that the decisions of the old Court of Chancery are irrelevant, since they relate to the lapse of time under the Statute of Limitation, whereas, in the instant case the lapse of time is in respect of a contractual obligation. No reasons were advanced as to why the terms of a contract are to be considered more sacrosanct than the provisions of a statute. The conclusion, I have come to is that, if, the court has inherent jurisdiction to restrain a defendant from setting up the defence of limitation under a statute it must be deemed to have the power, in an appropriate case, to also restrain him from pleading limitation under a contract. The test for the application of the rule appears to be not whether the period of limitation is statutory or contractual, but whether the lapse of time was caused by circumstances beyond the control of the party concerned when he was actively pursuing his right of action in a court.

Again it was argued, that the appellant's application was misconceived because of the absence of any provision in the Arbitration Ordinance, 1950, to extend time under a contract as provided by section 27 of the English Arbitration Act of 1950. The section was enacted to give relief where the lapse of time caused 'undue hardship'. What is undue hardship is discussed in the case of the *Liberian Shipping Corporation* (6) but the object of section 27 was summed up by Lord Denning M.R. in the following words, namely "In order to avoid injustice, the legislature intervened so as to enable the court to extend the time in such a case". There can be no doubt that section 27 was written into the English Arbitration Act because the court had otherwise no jurisdiction to extend time. However, was the application before Gill J. an application for extension of time? He says in the penultimate sentence of his judgment: "The court had otherwise no jurisdiction to extend time. except where such power is expressly given to it under a provision of law." I fully agree with this dictum, but I say, with respect, that the learned judge had misconceived the nature of the application before him. The Court of Chancery did not purport to extend time under the statute. A Court of Equity acts in personam and the orders made by the Court of Chancery were injunctions restraining the defendant from

setting up a defence under the Statute of Limitation. The application in the present case is also in the nature of an injunction, namely, to restrain the respondent from relying and to be precluded from relying on the lapse of time. The High Court, in my opinion, has the power to grant the relief prayed for, provided that the other circumstances under which the Court of Chancery granted the relief are present. I shall consider the other circumstances later.

The next point taken was that the court had no power to impose conditions, except in regard to costs, when making an order for stay of proceedings under the Arbitration Ordinance, 1950. In support of this proposition section 21 of the Ordinance is relied on. The section reads:—

"Any order made under this Ordinance may be made on such terms as to costs or otherwise as the authority making the order thinks fit."

It was argued on behalf of the appellant that the words "or otherwise" were wide enough to empower the court to impose any condition it thought fit and proper and, on behalf of the respondents, that those words should be read *ejusdem generis* with costs. In my opinion, there is no need to consider the question at all since the power of the High Court to grant an injunction in the exercise of its equitable jurisdiction arises independently of any power which the Arbitration Ordinance may purport to give. The only circumstance in which a court would refrain from exercising its inherent power would be when in relation to any cause or matter before the court to which an Ordinance applies, there is an express provision forbidding the exercise of the court's inherent power. Under section 11 of the Common Law Procedure Act of 1854, the Court in England was empowered to stay proceedings in an action on such terms as to costs or otherwise, to enable the parties to refer a dispute to arbitration under a written agreement. And yet the court in making an order for stay, did in appropriate cases, on a cross motion, order the appointment of receiver to preserve the property in dispute. The employment of the words "costs or otherwise" did not deter the court from making a supplemental order in relation to the stay. One of a series of cases in which such an order was made was *Compagnie Du Senegal Woods.*[7] Section 20 of the English Arbitration Act of 1889 is the same as section 21 of our Ordinance, but even after the passing of that Act, the court in *Pini* v. *Ronocoroni* [8] and in other cases continued to make similar orders. I fail to see anything in the provisions of the Arbitration Ordinance from which it could be inferred that the power of the court to grant an injunction is restricted or prohibited.

It remains to be seen whether, in the instant case, all the circumstances are present which would have rendered the situation analogous to the situation in which the Court of Chancery had acted. To envisage a parallel situation there must be, in my opinion: (a) two forums with nominal jurisdiction to hear and resolve a dispute between the same parties; (b) the statutory or contractual period of limitation should have expired whilst the question of the appropriate forum to resolve the dispute was pending disposal or was under consideration; and (c) it was beyond the control of the aggrieved party to do anything consistent with his legal rights, to escape the consequences of his claim being barred by the effluxion of time.

Referring to the failure of the appellant to submit his claim to arbitration, Gill J., says in his judgment:—

"He had notice of the application by the third party for a stay of proceedings, and thus had notice of the fact that he had chosen the wrong forum. It was then for him to have considered clause 7 of the policy of insurance and taken steps to drop his proceedings against the third party and to refer the matter to arbitration. In failing to do so, he has allowed time to run out, for which he had nobody but himself to blame".

The condition in clause 7 reads:—

"And an award made shall be a condition precedent to any liability of the company or any right of action against the company".

The effect of this clause was considered in *Scott* v. *Avery,*[9] and the House of Lords held that a right of action would only accrue after an award was made and that an agreement to refer a dispute to arbitration as a precondition was not void since it was not an agreement to oust the jurisdiction of the court or, in that particular case, contrary to public policy.

In the instant case, the appellant was sued by the Central Electricity Board before the notice of disclaimer was served upon him by the respondent. He filed a statement of defence denying liability, whereupon the question of his liability to pay damages became sub-judice. Since liability was denied, a claim for indemnity could not have arisen under the contract. The appellant could not have gone to an arbitrator and claimed indemnity in respect of a liability which he denied. Nor would an award made in those circumstances be of any practical value if the court were subsequently to dismiss the plaintiff's action against the appellant. This is not a simple case of an insured suing his insurers under a contract to indemnity in respect of a claim which had already arisen. If that was so, and the court had stayed the proceedings under section 5 of the Arbitration Ordinance, the issue before the arbitrator would have been a simple one. But in this case the respondent is the third party and the question of their liability to indemnify the appellant is dependent upon an issue to be tried by the court. The order to stay proceedings made in this case does not amount

to an abdication by the court of its exclusive jurisdiction to try the issue as between the plaintiff and the appellant. In the circumstances, what the arbitrator had been asked to decide is the purely hypothetical question of the respondent's liability in the event of the plaintiff succeeding in his action against the appellant. Even if the arbitrator decides the question of indemnity in favour of the appellant, he would not be in a position to make an award in respect of a claim which is non-existent. Therefore, in my considered opinion, the notice of disclaimer by the respondent is bad. Since a claim under the contract had not arisen, the notice could amount to a notice of repudiation of the contract, in which case, the appellant would be entitled to take his claim to the court. On the other hand if the notice was meant to be a warning of their intention to disclaim liability in the event of a claim being made, then the time to refer the dispute to arbitration would begin to run only from the date when the claim is made or had arisen.

Now assuming that I am wrong, and that the time did begin to run from the date of the service of the notice, the appellant was left with no other choice but to implead the respondent as a third party. The purpose of impleading a person as a third party is to enable the court to decide all the issues between the plaintiff and the defendant on the one hand and between the defendant and the third party on the other, in one and the same action. When the respondent was served with the third party notice, they had the option of either waiving their right under the Scott-Avery clause or applying to set aside the third party notice. They did not apply to set aside the third party notice. They must, therefore, be deemed to have waived their right under the clause and agreed to submit their dispute for adjudication by the court. They cannot now be permitted to resile from that pisition. They cannot, for instance, now be heard to say that they had not agreed to submit their dispute for adjudication by the court, as they had all along intended to invoke the provisions of section 5 of the Arbitration Ordinance. The proof that the court has assumed jurisdiction lies in the fact, that the respondent cannot rely any more on the contract to refer the dispute to arbitration but on the indulgence of the court. When, therefore, the court stayed further proceedings to enable the parties to go to the court of an arbitrator, a situation arose which, in my opinion, is analogus to the situation which prevailed when the old Court of Chancery referred an issue for trial before a Court of Common Law.

Assuming once again that the notice of disclaimer is valid, it cannot be disputed that the period of limitation ran out while the hearing of the application by the respondent for a stay of proceedings was pending. In this connection, the court was blamed for the 'lamentable delay' in fixing an early date for the disposal of the application. There is nothing on the record to show that the blame lay on the court. When a case is adjourned generally for a date to be fixed, the first duty is upon the parties to apply to the registrar to fix an early date. There is nothing on the record to show what steps were taken by the parties to expedite the hearing. However, the argument that time would have been saved if the appellant had consented, in the first instance, to a stay of proceedings, is besides the point, since the appellant had in my opinion, good reason for opposing the stay at that stage of the proceedings. In the result, all the circumstances necessary to apply the old rule of Chancery is present in this case.

The appeal will therefore be allowed. The order of court dated the 2nd of June 1967 dismissing the motion dated 24th April, 1967 is hereby set aside and an order is hereby made in terms of the motion, as amended by extending the last date in regard to the lapse of time to the 13th day of June, 1968, with costs to the respondents. The appellant to have the cost of this appeal.

Barakbah L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Shook Lin & Bok; D. G. Ironside.*

TEOH GOR HUA v. CAMEL PLYWOOD CORPORATION LTD.

[O.C.J. (Chua J.) June 28, 1968]
[Singapore — Suit No. 1843 of 1966]

Master and Servant — Workers in a factory supplied by labour contractor — Whether they are servants of factory owner — Breach of statutory duty.

Factories — Statutory duty — Factories Ordinance, 1958, s. 22(1).

The plaintiff in this case claimed damages for personal injuries suffered whilst at work in the defendant's factory. The facts showed that the plaintiff was a worker supplied by the labour contractor who had entered into a contract with the defendants to supply the labour. It was alleged in the alternative to the claim based on negligence in this case that there was a breach of a statutory duty under the Factories Ordinance. The plaintiff was injured when he was struck in the eye by a piece of saw tooth which flew off from the band-saw on which he was working. It was alleged that the band-saw was not adequately fenced as required under section 22(1) of the Ordinance.

Held: (1) on the facts the plaintiff was not the servant of the defendant's and therefore the claim of the plaintiff for damages at common law must fail;

(2) the obligation under section 22(1) of the Factories Ordinance, is only to protect against direct injury by contact with the dangerous part of the